IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-702

RALSTON PURINA COMPANY,
Petitioner,

vs.

NABISCO, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

ROBERT S. ALLEN
DOMINIC TROIANI
DAVID W. DETJEN
611 Olive Street
St. Louis, Missouri 63101
Attorneys for Ralston Purina Company

LEWIS, RICE, TUCKER, ALLEN & CHUBB
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

Table of Cases

Statutes Cited

Miscellaneous Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. .....

RALSTON PURINA COMPANY,
Petitioner,

vs.

NABISCO, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on June 16, 1976, and modified on August 25, 1976.

OPINIONS BELOW

This action was tried before a jury in the United States District Court for the Eastern District of Missouri. The original opinion of the panel of the United States Court of Appeals for

the Eighth Circuit, which reversed a judgment for petitioner, is reprinted in Appendix A. In response to a timely petition for rehearing and rehearing *en banc*, the panel on August 25, 1976, filed an order, which is reprinted in Appendix B, modifying its original opinion, but it denied the petition for rehearing. In that order of August 25 the Court of Appeals also denied the petition for rehearing *en banc*, with three judges dissenting. The final opinion of the Court of Appeals as modified has been officially reported in 541 F.2d 679.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S. C.A. §1254(1) and Supreme Court Rule 19.

The original opinion of the Court of Appeals was filed on June 16, 1976, and modified by order of the panel on August 25, 1976, in response to Petitioner's petition for rehearing and rehearing *en banc*. This Petition for a Writ of Certiorari has been filed within ninety days of August 25, 1976, as required by Supreme Court Rule 22.3 and 28 U.S.C.A. §2101(c). *United States v. Healy*, 376 U.S. 75, 11 L.Ed.2d 527 (1964); *Department of Banking v. Pink*, 317 U.S. 264, 87 L.Ed. 254 (1942).

QUESTIONS PRESENTED

1. Is it a proper function of the Court of Appeals to construe a document (in this case, a guaranty) and thereby reverse a contrary jury finding regarding the intention of the parties, (a) without first deciding whether the document was clear and unambiguous, and (b) without deciding whether all of the evidence created a fact issue to be decided by the jury.

2. Is it a proper appellate function to reverse a judgment based upon a jury verdict on a non-jurisdictional issue never pleaded, briefed or argued in the trial court, but raised by the Court of Appeals, *sua sponte*.

CONSTITUTIONAL PROVISION INVOLVED

Article VII of the Amendments to the United States Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

On June 4, 1973, petitioner, Ralston Purina Company, filed this action against the respondent, Nabisco, Inc., in the Circuit Court of the City of St. Louis, Missouri. The suit was based upon a guaranty letter dated September 29, 1972, which was delivered by Nabisco to Ralston. In this letter Nabisco guaranteed the obligations of its wholly-owned subsidiary, Freezer Queen, Inc., under a contract of even date wherein Freezer Queen agreed to purchase a plant from Ralston. Ralston contended in the suit that Freezer Queen breached the contract and thus Nabisco was liable to Ralston on the guaranty for Ralston's damages incurred as a result of the breach.

Nabisco removed the action to the United States District Court for the Eastern District of Missouri since there was diversity jurisdiction under 28 U.S.C. § 1332. After nearly 18 months of extensive pre-trial preparation, the case was tried before a

jury in the court of District Judge John K. Regan. The trial began on January 6, 1975, and on January 22, after nearly 2½ weeks of trial, the jury returned a verdict for Ralston for the sum of $3,333,083.30. The jury also answered special interrogatories submitted to it by the District Court which included findings, the substance of which were that (1) the guaranty had been accepted by Ralston; (2) the parties intended that the guaranty include Freezer Queen's obligation to close, if Ralston had performed certain conditions precedent; and (3) Ralston had performed the conditions precedent to closing, and the purported termination of the contract by Nabisco's subsidiary was *not* in good faith. (A-5, A-6).

Judgment was entered on the verdict for Ralston, and Nabisco appealed to the United States Court of Appeals for the Eighth Circuit. A panel of that court reversed Ralston's judgment outright. It ruled that there was sufficient evidence to support the finding that the guaranty letter had been accepted, but it construed the letter to mean that the guaranty did not extend to Freezer Queen's obligation to close the contract, even though the jury expressly found that the conditions precedent in the contract had been satisfied by Ralston.

This construction so "limiting" the effect of the guaranty was in spite of the fact that the guaranty provided that Nabisco would "guarantee the performance by Freezer Queen Foods, Inc. of its obligations arising out of the agreement . . . of even date." In so doing the Court of Appeals also ignored the express finding of the jury that the parties intended that Nabisco guarantee that Freezer Queen would close if Ralston performed the conditions in the contract. Incredibly, the Court of Appeals did not pass upon the sufficiency of the evidence to support the jury's findings that Freezer Queen's failure to close and termination of the contract was not in good faith. Instead, the court initially ruled that Ralston could not recover on the guaranty *unless* it first arbitrated with Nabisco's wholly-owned subsidiary,

Freezer Queen, the issue whether Freezer Queen's termination was in good faith, a question already decided by the jury.

The Court of Appeals in its initial opinion expressly inferred that if Ralston so proved a breach (a second time) before an arbitration panel, Nabisco would be liable on the guaranty.[1] Even though the Court of Appeals "found" that the parties did not intend that Nabisco guaranteed that its wholly-owned subsidiary would perform, in footnote 8 (A-22) the court stated that the judgment below would be modified to include a finding that Ralston accepted the guaranty, and that this finding should be given appropriate effect if Ralston prevailed in arbitration. This anomaly, even though modified to correct (cosmetically) the patent inconsistency and the court's initial false premise concerning arbitration, cannot stand.

The jury finding was based on the guaranty and extrinsic evidence introduced by both parties on the issue of intention. The issue of arbitration was never even suggested by Nabisco in the District Court. It elected to prepare and try the case before a jury.

STATEMENT OF FACTS

On September 29, 1972, Ralston entered into a written contract with Freezer Queen Foods, Inc., a wholly-owned subsidiary of Nabisco. Under the contract Freezer Queen was to purchase from Ralston a frozen food plant located in Wellston, Ohio. The sale price of the plant was $9,000,000.00, including $1,000,000.00 in cash to be paid by Freezer Queen and the as-

---

[1] After construing the guaranty letter to mean that it did not cover the obligation of Freezer Queen to perform, the Court of Appeals said (A-21) that Nabisco is not liable on the guaranty *unless* an arbitration panel first "determines that Freezer Queen breached the underlying contract by not closing."

sumption by Freezer Queen of $8,000,000.00 bonded indebtedness incurred initially to build the plant and related water and sewer improvements. The contract contained two clauses providing that Freezer Queen would have no obligation to close unless (1) it was satisfied that a natural gas allocation for operation of the plant would be available to it upon purchase and (2) it would be able to employ those Ralston employees needed to operate the plant.[2] The contract contained an arbitration clause[3] and was to be construed in accordance with the laws of the State of New York.

At the same time the contract was executed, Nabisco delivered to Ralston its guaranty letter, which will be quoted in full later in this Petition.

Preceding the execution of the agreement and the guaranty letter, top officers of Ralston negotiated the sale of the plant with top officers of Nabisco. Nabisco approved the purchase, and the General Counsel of Nabisco drafted the contract and the guaranty. It was his idea to structure the sale from Ralston

---

[2] Those two relevant conditions precedent were as follows:

"Article 5. *Conditions* of *Closing—Assignee*

"The obligation of Assignee [Freezer Queen] to complete the transactions contemplated by this Agreement is subject to the satisfaction on or prior to the Closing Date of the following conditions:

. . .

"(d) Assignee shall have been satisfied that it will be able to employ those employees of Assignor [Ralston] that in the judgment of Assignee's President Assignee will need to operate the plant being acquired hereunder after the Closing Date.

"(e) The restoration of Assignor's allocation of natural gas from Columbia Gas of Ohio, Inc. to 50,800,000 cubic feet per year and the establishment to Assignee's satisfaction that said restored allocation will be available to Assignee on and after the Closing Date."

[3] Article 10 of the agreement provided:

"Any controversy or claim arising out of or relating to any misrepresentation or breach of warranties of the agreements contained herein . . . shall, if not agreed upon between Assignee

to Freezer Queen, with a guaranty by Nabisco of the obligations of its wholly-owned subsidiary. It was the Board of Directors of Nabisco which authorized the execution of the agreement and the guaranty.

Freezer Queen's board did not function and no resolution was adopted by them. At the time these documents were executed, on September 29, 1972, Freezer Queen had a net worth of 1.7 million dollars and was indebted to Nabisco on intracompany loans of over 4 million dollars. The President of Freezer Queen, Mr. Paul Snyder, who later played an active role in terminating the contract, was not even present when the terms of the agreement were finally agreed upon between Ralston's president and Nabisco's top-ranking officers and directors on the evening of September 29, 1972.

Snyder nonetheless contended that he was the "chief negotiator" of the agreement and expressed his dissatisfaction that the Chairman of the Board and President of Nabisco finalized the contract with Ralston in his absence. Ralston's evidence was that this dissatisfaction was among the many significant factors which built up and led to Snyder's ultimate wrongful termination of the contract on November 1, 1972.

The controversy and the issues which were tried. In the contract the parties agreed to close as soon as practicable prior to November 30, 1972. There was no closing because Freezer Queen purported to terminate the contract beginning with an initial notification to Ralston on November 1, 1972. The stated reasons for the termination were that Freezer Queen was not satisfied either that the gas allocation would be transferred to it or that it would be able to employ those employees of Ralston

---

[Freezer Queen] and Assignor (petitioner], be settled by arbitration to be held in the City of New York before three arbitrators in accordance with the rules then obtaining of the American Arbitration Association and judgment on the award rendered may be entered in any court having jurisdiction."

needed to operate the plant. Ralston contended that the termination was wrongful in that it had complied with all conditions precedent and that Freezer Queen and Nabisco did not act in good faith in terminating the contract. Nabisco also pleaded that the guaranty was not accepted and that the scope of the guaranty did not include the obligation of Freezer Queen to close. Nabisco, however, did *not* plead the arbitration clause. Neither Nabisco nor Freezer Queen requested arbitration. Nabisco filed no motion to dismiss or stay Ralston's lawsuit pending arbitration. Instead, Nabisco elected to defend Ralston's action in court.

The issues which were tried were hotly contested, and most of the evidence concerned the factual controversy of whether the contract was terminated in good faith. There was evidence, some of which was conflicting, on the issues of whether Ralston accepted the Nabisco guaranty and whether the guaranty extended to include the obligation of its subsidiary to close.

The issue of breach. Because of the two satisfaction clauses, it was necessary for Ralston to prove that the termination was not in good faith. Ralston's evidence was that it complied with the two contested conditions in the contract in that it proved to the satisfaction of the jury (1) that Freezer Queen was able to employ Ralston's former employees needed to operate the plant, and (2) Nabisco obtained a commitment from the utility which supplied the natural gas to the plant that Ralston's allocation would be available to Freezer Queen when it purchased the plant.

(1) *A brief resume of the facts concerning employees.* Negotiations between Ralston and Nabisco to sell this plant began in July of 1972. Prior to execution of the contract of September 29th, executives of Nabisco and Freezer Queen, made five visits to Ralston's plant. At Nabisco's request Ralston extended termination dates of its salaried employees to enable Freezer Queen to employ them. By September 18, 1972, Freezer Queen had succeeded in employing a nucleus of Ralston's salaried personnel

who had run the plant, and twelve of those employees began commuting between Wellston, Ohio, and Buffalo, New York, and actually working in the Freezer Queen plant which was located there.

Ralston's evidence was that on September 29th, Freezer Queen had hired or had commitments from those employees of Ralston needed to operate the plant. It obtained acceptances from additional employees after the 29th and no Wellston employees declined employment after that date. Freezer Queen's own executives admitted that the commuting employees were a "good supervisory group." After that time neither Freezer Queen nor Nabisco indicated any problem about employees until November 1, 1972. At that time Mr. Snyder, the president of Freezer Queen, made the particular point that he could not employ Ralston's plant manager to run the plant. Ralston's evidence was that this was known before the contract was signed, that the job offered him was not that of plant manager, and that Snyder had, in fact, offered the plant manager's job to another Ralston employee, who accepted.

(2) *The gas allocation issue.* The gas company servicing this plant had previously allocated to Ralston 50,800,000 cubic feet of natural gas per year. After Ralston had decided to sell the plant, it was necessary to negotiate with the gas company the transfer of this allotment. The gas company by letter dated October 16, 1972, agreed to transfer conditionally the 58,000,000 allocation to Freezer Queen but denied Nabisco's request for an increase.

Nabisco's general counsel, who admitted receiving this letter, went to Wellston on October 23, 1972, to check out other technical aspects preparatory to closing. He admitted he would not have made the trip if Freezer Queen and Nabisco did not intend to close. Snyder, however, on October 26th told the Ralston commuters that the deal was off unless the gas situa-

tion was cleared up by the end of October. The gas company then advised Snyder on October 30th that the transfer of the 50,800,000 cu. ft. was "positive." In addition, the gas company wrote a letter to Snyder dated October 30, 1972, wherein it assured him, unconditionally, that if Freezer Queen purchased the plant, the utility "will suppply 50,800,000 cu. ft. of gas annually."

(3) *The Termination.* On October 31st, Nabisco's general counsel left the country on other business, telling Ralston's president that there were no impediments to closing. Snyder, however, called Ralston's president the very next day and stated that he wanted to terminate. Following a strategy meeting at the Nabisco offices on November 2nd, Snyder wrote, with the assistance of Nabisco's assistant general counsel, a termination letter dated November 6th in which he designated both employees and gas as the reasons for termination.

(4) Ralston's evidence was the reasons given were feigned and not the true reasons. Highlights of the evidence included both documentary and circumstancial evidence that Snyder had "cooled considerably on the deal." He thought the price agreed to by Nabisco on September 29th (in his absence) was too high. A serious union problem had erupted at his Buffalo plant on September 28th, the day before the contract was signed. It was admitted that the concern of the union was the loss of jobs for its members, if Freezer Queen purchased the Ralston plant in Wellston, Ohio. The jury believed this and other evidence adduced by Ralston and answered three special interrogatories to the effect that Ralston had performed and Nabisco's termination was not in good faith.

The acceptance of the guaranty. Both sides also adduced testimony on this issue. The jury was given proper instructions and answered a special interrogatory that Ralston did, in fact, accept the guaranty. The Court of Appeals did not disturb this finding.

The scope of the guaranty. The final questions submitted to the jury by special interrogatories was whether the parties intended the guaranty to cover the obligation of Freezer Queen to close, if the conditions of the contract were met. The guaranty letter provided:

> "This will serve to confirm our mutual understanding and agreement that as long as Freezer Queen Foods, Inc. is a wholly-owned subsidiary of Nabisco, Inc., *Nabisco, Inc. will guarantee the performance by Freezer Queen Foods, Inc. of its obligations arising out of the Agreement between Freezer Queen Foods, Inc. and Ralston Purina Company of even date* with respect to Ralson [sic] Purina Company's Wellston, Ohio facilities.
>
> In the event Nabisco, Inc. should decide to dispose of Freezer Queen Foods, Inc. at some future date, Nabisco, Inc. will use its best efforts to have the purchaser of Freezer Queen Foods, Inc. likewise guarantee the performance by Freezer Queen Foods, Inc. of its obligations under said Agreement." [Emphasis added.]

Extrinsic evidence was adduced by both parties as to the intention of Ralston in requesting the guaranty and of Nabisco in granting it. The jury answered by a special interrogatory that Nabisco *did* intend to guarantee that Freezer Queen would close, if the conditions of the contract were performed.

The Court of Appeals, after declining to rule whether the letter was ambiguous, ignored the jury's special finding on the issue and construed the guaranty as if the appeal in this jury case were a hearing *de novo.* It considered some, but not all, of the evidence of intention and never decided whether the evidence was sufficient to support the jury's special finding.

The evidence of intention. Ralston's evidence was that the letter was intended to provide Ralston with the complete finan-

cial assurance of Nabisco that its subsidiary would carry out its obligations under the contract. This included the obligation to pay Ralston the million dollars in cash and to assume the eight million dollars in bonds. The following evidence adduced by Ralston supports the jury's special finding.

1) Ralston negotiated this deal with Nabisco. Nabisco's counsel structured this deal so that its subsidiary would take title, but Nabisco approved the deal.

2) Ralston was looking to Nabisco as the responsible party to pay the consideration under the contract, to stand behind its subsidiary.

3) Ralston's president, who negotiated the contract with the Nabisco officials, would not sign the contract until he was assured that a condition in the Nabisco guarantee would be eliminated at closing. The evidence showed that he did not believe he had a firm deal until then, and that he was looking to Nabisco to back up Freezer Queen's obligations under the agreement from September 29th until *all* of their obligations set forth in the contract had been discharged.

4) Admissions of Mr. Robert Schaeberle, president of Nabisco, were read into the record as to his intentions for Nabisco in dealing with Ralston. He testified:

> ". . . that people from Ralston raised a natural question—'After all, who is Freezer Queen? What financial backing do they have?' " [Ct. App. Appendix A-337]

5) Schaeberle knew the guaranty letter had to be signed and delivered the evening of the 29th because "they had to have this agreement to go along with the other agreement." (Ct. App. Appendix A-337)

6) When Schaeberle was asked where the consideration to buy the plant was going to come from, he said:

> "A. It was going—I have to plead ignorance as to how much was in cash and how that was all going to be worked out. I'm not at all certain, but *it was a contract between one of our wholly-owned subsidiaries, Freezer Queen.*
>
> Q. *And Nabisco was standing behind it on the guarantee——*
>
> A. *On the guarantee of the performance that on this contract that was carried by Freezer Queen, that we would stand behind Freezer Queen.*" [Ct. App. Appendix A-397 emphasis added.]

The Court of Appeals characterized this latter admission as "equivocal," but Mr. Schaeberle did not come to St. Louis and testify on behalf of Nabisco or otherwise explain his own letter to the jury.

REASONS FOR GRANTING THE WRIT

This Court should grant a Writ of Certiorari and review the decision of the Court of Appeals because:

I. The decision of the Court of Appeals is a flagrant excess of appellate power and is such a departure from the proper scope of appellate review in a jury tried case that this court should grant certiorari.

II. The opinions of the Court of Appeals indicate that the court so totally misconstrued and misapplied fundamental concepts of state law that the court undermined the judicial and appellate process, justifying intervention by this court through the grant of the writ of certiorari.

ARGUMENT

I. The Decision of the Court of Appeals Is a Flagrant Excess of Appellate Power and Is Such a Departure From the Proper Scope of Appellate Review in a Jury Tried Case That This Court Should Grant Certiorari.

At the outset, the Court of Appeals never decided the initial question to be determined by a court in construing a document or reviewing the construction of that document by a lower court: Whether the guaranty was ambiguous. The fundamental rules of contract construction in a jury case are that (1) the issue of ambiguity is for the court to determine and should be decided at the outset; (2) if the document is ambiguous, then extrinsic evidence is admissible as to what the parties intended; (3) the question of intention is submitted to the jury when the extrinsic evidence in regard to intention is controverted. *Meyers v. Selznick Company*, 373 F.2d 218 (2d Cir. 1966).

An appellate court is to follow a similar process: First determine if the District Court was correct in ruling the document ambiguous and then determine if the extrinsic evidence is sufficient to support the findings of fact as to the intention of the parties to the document. *Maritz, Inc. v. ACF-Wrigley Stores, Inc.*, 283 F.2d 75, 77-78 (8th Cir. 1960).

Here, the District Court found the document was ambiguous, and submitted the question of intention to the jury. The Court of Appeals never did decide whether the guaranty letter was ambiguous, but rather sought to review the contract "alternatively": Ostensibly construing the contract within its four corners and then selectively reviewing the extrinsic evidence to "support" its "four corners" construction of the document, rather than reviewing the evidence to determine if it was sufficient to support the jury verdict. Each of these two "alternative" determinations of the Court of Appeals in reviewing the contract is incorrect and improper appellate review.

A. *The Court of Appeals ignored the rules of contract construction and improperly implied a limitation not present in the language of the guaranty letter in ostensibly construing that letter within its four corners.*

A majority of the Court of Appeals panel in its "four corners" discussion in Part II-A of the opinion considered initially only the guaranty letter itself. This was improper appellate review at the very outset, however, since the Court of Appeals should have construed *both* the Nabisco guaranty letter and the Freezer Queen contract together. *Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261 (2d Cir. 1965); *Nau v. Vulcan Rail and Const. Co.*, 286 N.Y. 188, 36 N.E.2d 106 (1941); 4 *Williston on Contracts*, §628 (3d ed.). After all, it was Freezer Queen's "performance" of "its obligations arising out of" the contract that Nabisco guaranteed. The contract defines Freezer Queen's obligations which were the subject of the guaranty and expressly

imposed upon Freezer Queen a duty to close upon satisfaction of the relevant conditions precedent in the contract.

Part II-A of the opinion of the Court of Appeals notes that the guaranty letter covered obligations after the closing.[4] That, of course, is true, but this does not mean that Nabisco did not guarantee all of Freezer Queen's obligations as specified in the contract and as of the date the contract and guaranty were executed and delivered. The language of the guaranty letter covered *both* present and future obligations. In its opinion, the Court of Appeals recognized that the guaranty letter guaranteed the "then-existing situation," but then noted that the second paragraph relates to a future event. From this the court concluded that because the guaranty also guaranteed future obligations, the guaranty letter *only* applied to those obligations which would arise after closing, to the exclusion of obligations which were to be performed prior to and at closing. We submit that such a construction is not in accordance with the clear language of the letter, and is an Olympian version of what was intended at the time.

The first paragraph of the guaranty letter *does* (not "may" —as expressed in the opinion of the Court of Appeals) "represent an obligation arising out of, incident to, or under" the contract. The second paragraph of the guaranty letter, in relating to a possible future disposition of Freezer Queen by Nabisco, expressly states that this will occur "at some future date." Such language supports Ralston's construction of the first paragraph of the guaranty as relating to both future and present obligations, since the draftsman of the guaranty letter obviously knew how to limit the obligations of the guarantee to future events if that was the intention.

---

[4] So did the agreement with Freezer Queen: "All . . . agreements included or provided for herein shall survive the Closing Date and the consummation of the transactions provided for herein." (Article 10 of the Agreement.)

In addition, nowhere in Part II-A of the opinion is there any indication that the Court of Appeals was aware of its obligation to construe the guaranty letter strictly against the party seeking to limit its scope. Instead, the Court of Appeals construed paragraph 1 of the guaranty narrowly, as if Ralston had prepared it, to apply to only obligations arising after closing, even though the language of paragraph 1 contains no such express limitation and was drafted by general counsel for Nabisco.

Accordingly, in its four corners construction of the guaranty letter, the Court of Appeals ignored such fundamental principles of contract construction that supervisory intervention by this Court is warranted.

B. *The Court of Appeals exceeded the scope of appellate review when it disregarded the verdict of the jury on the scope of the guaranty letter.*

But the Court of Appeals also grossly abused the appellate process in seeking to justify its "four corners" construction of the guaranty letter by a selective review of the extrinsic evidence presented to the jury at trial on the question of intention.

Judge Friendly in *Meyers v. Selznick Company*, 373 F.2d 218, 222-223 (2d Cir. 1966), discussed the relationship of judge and jury in a case such as this where the question of ambiguity has been submitted to the jury. Citing Professor Corbin, Judge Friendly ruled that once ambiguity has been determined, the issue of intention must be submitted to the jury unless "no reasonable man could reach more than one conclusion." In support of this standard, he cited cases for the proposition that, where a contract is ambiguous, a jury question is presented to determine "inferences of fact from all of the pertinent circumstances," especially where those "inferences are conflicting." 373 F.2d at 223. He specifically criticized a certain past judicial

skepticism of jurors' abilities and stated: "A judge has no particular institutional competence to determine such issues. . . ." *Id.* If there is extrinsic evidence which is in controversy or disputed, inferences to be derived from the evidence on the issue of intention are to be made by the jury. *J. T. Majors & Son, Inc. v. Lippert Bros., Inc.*, 263 F.2d 650, 654 (10th Cir. 1958).

The role of the Court of Appeals in reviewing the findings of fact of a jury is severely circumscribed by the Seventh Amendment. As this Court noted in *Atlantic and Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 358-59, 7 L.Ed.2d 798, 803 (1962):

> We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

See also Galloway v. United States, 319 U.S. 372, 87 L.Ed. 1458 (1943); 5 Moore's Federal Practice ¶ 38.08[5]. A corollary of this constitutional principle is that the Court of Appeals must review the evidence adduced at trial in the light most favorable to the prevailing party. *See, e.g., Continental Ore Company v. Union Carbide and Carbon Corporation*, 370 U.S. 690, 8 L.Ed.2d 777 (1962); 5A Moore's Federal Practice ¶ 50.02[1].

The Eighth Circuit itself has previously recognized this proper and limited scope of the appellate review of jury findings, *Carter v. Aetna Casualty and Surety Company*, 473 F.2d 1071 (8th Cir. 1973); *Leathers v. United States*, 471 F.2d 856 (1972), *cert. denied*, 412 U.S. 932, 37 L.Ed.2d 161 (1973); and that it must view the evidence in the light most favorable to

the jury findings. *Marshall v. Humble Oil and Ref. Co.*, 459 F.2d 355 (8th Cir. 1972); *Hanson v. Ford Motor Company*, 278 F.2d 586 (8th Cir. 1960).

On this appeal, however, the Court of Appeals went beyond the acceptable limits of appellate review established by the Seventh Amendment and its own judicial precedent to usurp the fact-finding functions of the jury. Thus the Court of Appeals in the course of its opinion evaluated the weight to be given certain evidence and adjudged the credibility of at least one witness based upon the cold transcript. Nowhere in the opinion is there any indication that the Court of Appeals considered the evidence in the light most favorable to petitioner and to jury verdict. To the contrary, the Court of Appeals searched the record for evidence to overturn the verdict which it should have presumed to be correct.

In its discussion of the intended scope of the guaranty, the Court first turned to evidence adduced at trial which it believed supported a conclusion contrary to the jury findings: evidence that the petitioner before September 29 had requested from Nabisco a guarantee of the performance by Freezer Queen of the long-term bond obligations which were to be assumed by Freezer Queen. But that evidence hardly rules out a guarantee of *all* of Freezer Queen's obligations by Nabisco and is not even inconsistent with a desire by Ralston to obtain an all-encompassing guarantee.

In further disregard of its proper appellate function, the Court of Appeals in its opinion discussed the credibility of one of Ralston's witnesses who testified in support of its position, when it labeled his response to a question as an "equivocation." Moreover, the court sought to minimize the significance and weight to be given the very important and crucial testimony of the President of Nabisco as to Nabisco's intention in standing behind the contract of its subsidiary, labeling the testimony as "at best is

equivocal." We submit that it is precisely when evidence is equivocal that a Court of Appeals has *no* basis for tampering with findings of a jury based upon such evidence, since it is the classic function of a jury to evaluate such "equivocal" evidence. See *Sanitary Farm Dairies, Inc. v. Gammel*, 195 F.2d 106, 117 (8th Cir. 1952).

Moreover, the Court of Appeals insisted in its opinion that the testimony of defendant's own president "must be construed" in light of a September 25th resolution of the Nabisco Board of Directors authorizing the execution of the contract by Freezer Queen and the guarantee by Nabisco of the assumption of the bond obligations. It was for the jury to determine what weight should be attributed to this Board resolution, especially in light of what transpired in the subsequent negotiations culminating in the September 29th meeting.

Finally, the Court of Appeals, in selectively picking out testimony from the transcript which supported a limited scope of the guaranty, wholly failed to review the broad panoply of evidence and testimony adduced to Ralston to support its position on what was the intent of the parties as to the scope of the guaranty letter. If the Court of Appeals had reviewed *all* of the evidence there could have been no other conclusion but that there was sufficient evidence to support the jury's verdict.

The opinion of the Court of Appeals reflects a serious deviation from the constitutional standard on appellate review of jury findings. The practice of the Court of Appeals in this case should not be condoned to the extent that it may serve as the basis for further unacknowledged efforts by an appellate court to ignore or overturn proper findings of fact of a jury. This Court in the past has recognized the need to oversee the proper functioning of the jury system. Thus the Court stated in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501, 3 L.Ed.2d 988, 992 (1959):

> "We granted certiorari [here] because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Schiedt*, 293 U.S. 474, 486."

The protection of the fact-finding power of the jury in this litigation is equally important and warrants review by this Court on certiorari. *See also Dick v. New York Life Insurance Company*, 359 U.S. 437, 3 L.Ed.2d 935 (1959) (reversal of overturning by Eighth Circuit of jury findings in accidental death case); *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500, 1 L.Ed.2d 493 (1957) (preservation of jury trial function in FELA cases).

II. The Opinions of the Court of Appeals Indicate That the Court So Totally Misconstrued and Misapplied Fundamental Concepts of State Law That the Court Undermined the Judicial and Appellate Process, Justifying Intervention by This Court Through the Grant of the Writ of Certiorari.

Under the court's holding the substantial award of damages is to be "vacated," and Ralston is to now arbitrate with Freezer Queen issues already decided by a jury. This represents a complete anomaly, since Nabisco did *not* make any plea that Ralston should first arbitrate with Freezer Queen, but instead elected to have this case tried in court. The arbitration issue should not have been considered by the Court, and a careful reading of the opinion of the Court of Appeals and the modification thereof reveals that this extraneous and false issue led the court to this gross injustice.

In the initial opinion the Court of Appeals stated that "Ralston could not bring a legal action against Freezer Queen for breach of the underlying sales contract since that written contract provided that any controversy arising out of the contract would be

settled by arbitration." This statement discloses an incorrect premise that the presence of an arbitration clause neccessarily precludes litigation, and we submit this has led the Court of Appeals to an improper construction of the guaranty letter. The fact that the Court of Appeals changed the opinion following petitioner's petition for rehearing (with three judges dissenting), to provide that this incorrect premise was (only) an assertion of Nabisco in its brief does not expunge the error, but merely evinces an unwillingness to stand on what in the original opinion had to have been an integral part of the reasoning of the Court of Appeals.

The contract which Nabisco guaranteed does contain an arbitration clause, but this did *not* prohibit Ralston from suing Freezer Queen. Missouri has a statute, Section 435.010 of Revised Statutes of Missouri 1969, which permits a party to sue notwithstanding an arbitration clause.

If suit had been filed against Freezer Queen in New York, it could have elected to stay the action pending arbitration.[5] On the other hand, it could have elected to forego arbitration, and the case would have been tried just like any other lawsuit.[6]

However, Ralston did not sue Freezer Queen. It sued its parent Nabisco in a state court in Missouri, as it had the right to do.[7] Nabisco removed the case to the federal court. With

---

[5] N.Y.C.P.L.R. §7503; *American Reserve Ins. Co. v. China Ins. Co.*, 297 N.Y. 322 (1948); 9 U.S.C.A. §3; *Shanferoke Coal and Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 79 L.Ed. 583 (1935); *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. 688 (S.D.N.Y. 1966).

[6] *Season-All Industries, Inc. v. Turkiye Sise Ve Cam Fabrikalari, A.S.*, 425 F.2d 34 (3d Cir. 1970); *Fremont Cake and Meal Co. v. Wilson and Co.*, 183 F.2d 57 (8th Cir. 1950); *Malan Const. Corp. v. Allis-Chalmers Mfg. Co.*, 35 App. Div. 2d 788, 315 N.Y.S.2d 258 (1970).

[7] Despite the apparent holding of the Court of Appeals to the contrary, in New York and in nearly every other jurisdiction a guarantor may be sued without first enforcing remedies against the primary obligor. See, *e.g.*, *Developers Small Business Investment Corp. v. Hoeckle*, 395 F.2d 80 (9th Cir. 1968); *United States v. Buffalo Coal Mining Company*, 343 F.2d 561 (9th Cir. 1965); *Joe Heaston Tractor and Implement Co. v. Securities Acceptance Corporation*, 243 F.2d 196 (10th Cir. 1957); *Pavlantos v. Garoufalis*, 89 F.2d 203 (10th Cir. 1937); *L.W.R.L. Co. v. Risman*, 48 Misc. 2d 390, 265 N.Y.S.2d 17 (1965); *Franklin Nat'l Bank v. Phoenix Insur Co.*, 178 N.Y.S.2d 700 (Sup.Ct. 1958).

reference to arbitration, Nabisco was in substantially the same position as Freezer Queen would have been had it been sued here. At this juncture Nabisco, as a guarantor, could have moved to stay this lawsuit pending arbitration between Ralston and Nabisco's wholly-owned subsidiary, relying on the Federal Arbitration Act (9 U.S.C.A. §3), or the trial court's inherent inequitable power to stay actions before it.[8]

The law of this case as originally announced appears to have been that there was an implied condition in the guaranty letter that there would be arbitration before Nabisco could be held liable. If this were so, Nabisco would clearly have the right to request a stay pending arbitration between Ralston and Freezer Queen. No such request was ever made, and Nabisco never asserted below or in this Court that arbitration was a condition precedent to its liability on the guarantee.

Nabisco at the outset of this case made a tactical decision to forego arbitration between Freezer Queen and Ralston, and to try the lawsuit in court. Having so elected, it should not now be entitled to an arbitration between Freezer Queen and Ralston.[9]

---

[8] See *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *United States v. Continental Casualty Co.*, 214 F.Supp. 949 (D.P.R. 1963); *United States v. Electronic & Missile Facilities, Inc.*, 206 F. Supp. 790, 792 (D.P.R. 1962); *Schilling v. Canadian Foreign Steamship Co., Ltd.*, 190 F.Supp. 462, 463 (S.D.N.Y. 1961); *Modern Brokerage Corp. v. Massachusetts Bonding and Insurance Co.*, 54 F.Supp 939 (S.D.N.Y. 1944).

[9] *See, e.g., Season-All Industries, Inc. v. Turkiye Sise ve Cam Fabrikalari, A.S., supra; Cornell & Co. v. Barber & Ross Co.*, 360 F. 2d 512 (D.C. Cir. 1966); *Fremont Cake and Meal Co. v. Wilson and Co., supra; American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115 (6th Cir. 1948).

The Eighth Circuit has previously refused to rule on points or issues not made before the trial court, especially when the point was not raised due to an adopted strategy. *Smith v. American Guild of Variety Artists*, 368 F.2d 511 (8th Cir. 1966). Yet here the Court of Appeals has injected the matter of arbitration when it was never raised by Nabisco.

Such a practice might be understandable if by doing so the Court of Appeals avoided a manifest injustice. But here Nabisco received a full and fair opportunity to litigate the substantive issues of this dispute. Indeed, the shocking aspect of the action of the Court of Appeals is that it renders as a waste of time months of pretrial preparation and weeks of trial consumed to litigate the factual issue of whether Freezer Queen breached the September 29th contract. This is hardly judicial economy, especially when *the very issues which are to be resolved in the arbitration have already been resolved by the jury in the trial of this action*. This action by the Court of Appeals flies in the face of the common sense approach previously taken by that court in *Fremont Cake and Meal Company v. Wilson and Company*, 183 F.2d 57, 59 (8th Cir. 1950), where the Court of Appeals held:

> In addition to this it may be observed that before this proceeding was instituted the actual substantive controversy between the parties had already been adjudicated by a court having jurisdiction both of the parties and the subject matter. There was no remaining substantive controversy between the parties. The only controversy here involved is as to the procedure by which the actual controversy should be determined. The controversy itself having been adjudicated, the proceeding to determine the procedure came too late as there was no controversy to arbitrate.

That is precisely the case here. Indeed, the Court of Appeals has thrust itself into this litigation and has invented and imposed upon the parties a legal issue which was waived by the parties.

CONCLUSION

The judgment of the Court of Appeals is a gross injustice. That court has so far exceeded the proper scope of appellate review that this Court should grant its writ of certiorari.

ROBERT S. ALLEN

DOMINIC TROIANI

DAVID W. DETJEN
611 Olive Street
St. Louis, Missouri 63101
Attorneys for Ralston Purina Company

LEWIS, RICE, TUCKER,
ALLEN & CHUBB
Of Counsel

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1444

Ralston Purina Company, Appellee,

v.

Nabisco, Inc., Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: March 11, 1976.

Filed: June 16, 1976.

Before VOGEL and VAN OOSTERHOUT, Senior Circuit Judges, and BRIGHT, Circuit Judge.

BRIGHT, Circuit Judge.

In mid-1972, the Ralston Purina Company (Ralston) entered into a contract to sell its frozen food processing plant located in Wellston, Ohio, to Freezer Queen Foods, Inc. (Freezer Queen), a wholly-owned subsidiary of Nabisco, Inc. (Nabisco). In connection with this transaction, Nabisco presented Ralston with a guaranty letter in which it allegedly guaranteed the contract obligations of its subsidiary. Freezer Queen thereafter declined to perform the contract and Ralston brought the instant action solely against Nabisco for breach of the guaranty contract. The district court submitted the issues to the jury upon a general verdict and special interrogatories. The jury found Nabisco liable to Ralston on the guaranty contract and assessed

damages in the sum of $3,333,083.30. Nabisco appeals asserting that it was entitled to a judgment of dismissal as a matter of law and alternatively contends that the district court committed prejudicial error in its instructions relating to damages.[1]

We have fully reviewed the record and reverse on the issue of contract liability.

The written documents and the essentially undisputed testimony relating to the background of the transaction disclose that in mid-1972, Ralston decided to sell its frozen food processing plant in Wellston, Ohio. This plant had been financed in substantial part through the issuance of industrial revenue bonds, which Ralston had assumed under its lease with a community improvement corporation which had constructed the facility for Ralston, and water and sewer bond obligations.[2] Corporate officers of Nabisco and Paul Snyder, the president of Freezer Queen (who also served as an officer of Nabisco) entered into preliminary negotiations with Ralston officials concerning the possible purchase of the plant. The parties apparently reached a tentative agreement by mid-September. On September 22, 1972, Nabisco's legal department forwarded to Ralston's attorneys an incomplete first draft of a proposed agreement for a sale transaction of these facilities to Freezer Queen, the Nabisco subsidiary.

Because of income tax ramifications, Ralston was anxious to sign a contract prior to the close of its fiscal year, September 30. Freezer Queen's president, Paul Snyder, had raised some questions relating to the transfer of supervisory personnel at the Wellston plant from Ralston to the proposed new owners, and to the transfer of the natural gas allotment which the gas distributor, Columbia Gas, had alloted to Ralston. Notwith-

---

[1] Federal jurisdiction rests upon diversity of citizenship.

[2] The industrial revenue bond obligations totalled seven million dollars, and the water and sewer bond obligations totalled one million dollars.

standing these impediments to consummation of a contract, Thomas Coleman, an attorney for Ralston, and Warren M. Shapleigh, president of Ralston, flew to New York on September 29, and at the Nabisco headquarters obtained a signed agreement for purchase of the Wellston facility by Freezer Queen. The agreement provided that Freezer Queen would pay Ralston one million dollars upon closing and would assume the obligations of the industrial revenue and water and sewer bonds totalling eight million dollars. In return, Ralston agreed to assign to Freezer Queen all of Ralston's rights, title, and interest in and to the Wellston plant. The parties agreed to a closing date as soon as practicable prior to November 30, 1972, but if not closed by that date, either party could terminate the agreement. The contract included several conditions relating to the closing of the transaction, including the following:

Article 5. **Conditions of Closing—Assignee**

The obligation of Assignee [Freezer Queen] to complete the transactions contemplated by this Agreement is subject to the satisfaction on or prior to the Closing Date of the following conditions:

(a) All legal matters shall have been approved by counsel for Assignee.

* * * * * * *

(d) Assignee shall have been satisfied that it will be able to employ those employees of Assignor that in the judgment of Assignee's President Assignee will need to operate the plant being acquired hereunder after the Closing Date.

(e) The restoration of Assignor's allocation of natural gas from Columbia Gas of Ohio, Inc. to 50,800,000 cubic feet per year and the establishment to Assignee's satisfaction that said restored allocation will be available to Assignee on and after the Closing Date. [A:Exhibit Vol. I, E-62-63.]

Pursuant to a request from Ralston's counsel a few days prior to the September 29 signing, Nabisco prepared a guaranty letter signed by its president, Robert M. Schaeberle and addressed to Mr. Shapleigh, president of Ralston. Legal counsel for Nabisco-Freezer Queen delivered the letter to Ralston's counsel at the September 29th conference. That letter read:

> This will serve to confirm our mutual understanding and agreement that as long as Freezer Queen Foods, Inc. is a wholly owned subsidiary of Nabisco, Inc., Nabisco, Inc. will guarantee the performance by Freezer Queen Foods, Inc. of its obligations arising out of the Agreement between Freezer Queen Foods, Inc. and Ralston Purina Company of even date with respect to Ralston [sic] Purina Company's Wellston, Ohio facilities.
>
> In the event Nabisco, Inc. should decide to dispose of Freezer Queen Foods, Inc. at some future date, Nabisco, Inc. will use its best efforts to have the purchaser of Freezer Queen Foods, Inc. likewise guarantee the performance by Freezer Queen Foods, Inc. of its obligations under said Agreement. [A:Exhibit Vol. I, E-80 (Ex. 28).]

The evidence, as discussed below, indicates that Shapleigh and Coleman, Ralston's attorney, expressed disagreement with the extent of the guaranty obligation but that J. Stewart English, a vice president of Nabisco, gave some assurance that the language of the guaranty letter could be satisfactorily modified at a later time. With this assurance, Ralston's president signed the agreement for the sale of the Wellston plant and turned the guaranty letter over to Coleman. Coleman thereafter wrote on the face of the letter guaranty the phrase: "Needs to be revised."

Thereafter, in November, Freezer Queen declined to close the contract because its president, pursuant to Article 5 of the contract, quoted above, asserted that Freezer Queen had been

unable to employ the necessary personnel from Ralston needed to operate the plant and that Ralston had not established to his satisfaction or the satisfaction of Freezer Queen's counsel, Walter Halliday, that the full natural gas allocation necessary for operating the plant could be restored and transferred from Ralston to Freezer Queen. Based on this alleged breach by Freezer Queen, Ralston brought this action against Nabisco alone on the letter of guaranty. Ralston could not bring a legal action against Freezer Queen for breach of the underlying sales contract since that written contract provided that any controversy arising out of the contract would be settled by arbitration. As of the time of trial, Ralston had not initiated any proceedings looking toward arbitration of any dispute with Freezer Queen. Ralston subsequently sold the Wellston plant to Banquet Foods for $3,750,000 in cash, and Banquet assumed the water and sewer bond obligations but not the industrial revenue bond obligations.

The district court presented the issues tendered by the parties to the jury in the form of five interrogatories, as follows:

SPECIAL INTERROGATORIES TO BE ANSWERED BY THE JURY

1. Did Ralston Purina accept the guarantee set forth in the letter of September 29, 1972 from Robert Schaeberle to Warren M. Shapleigh prior to entering into the contract with Freezer Queen?

Yes X No .....

2. If so, was said letter intended by the parties (Ralston Purina and Nabisco) to guarantee that Freezer Queen would close the transaction for the acquisition of the Wellston, Ohio, frozen food plant if the conditions of the contract were met.

Yes X No .....

3. Was Freezer Queen satisfied, in the exercise of good faith, that it would not be able to employ all of the employees of Ralston Purina that in the good faith judgment of Paul Snyder, the president of Freezer Queen, would be needed to operate the freezer plant for Freezer Queen?

Yes ..... No X

4. Was the allocation of 50,800,000 cubic feet to the Ralston's Wellston, Ohio, freezer plant from Columbia Gas of Ohio, Inc. restored prior to Freezer Queen's refusal to close?

Yes X No .....

5. Did Ralston Purina establish to the good faith satisfaction of counsel for Freezer Queen that such allocation would be available to Freezer Queen on and after the closing date?

Yes X No .....

[A:41-42.]

As noted above, the jury answered each of the five interrogatories in favor of Ralston and then by way of a general verdict awarded plaintiff damages in the sum of $3,333,083.30. In seeking reversal, Nabisco contends that the district court erred in submitting the contract issues to the jury and in refusing to grant judgment n.o.v., for the following reasons:

(a) no contractual relationship existed between the parties because the undisputed evidence showed that Ralston had rejected Nabisco's guaranty letter; (b) even if the guaranty letter did create a contractual relationship between Ralston and Nabisco, it did not encompass a guarantee by Nabisco that Freezer Queen would close the underlying contract; and (c) Freezer Queen did not breach the underlying contract because neither Freezer Queen's president nor its legal counsel were satisfied that the natural gas allocation would be restored and

Freezer Queen's president was not satisfied that Freezer Queen could employ the necessary Ralston supervisory personnel at the Wellston plant.

Appellee-Ralston contends that all contract issues rested on disputed matters of facts and were properly submitted to the jury and that the court's rulings and instructions relating to damages did not constitute prejudicial error.

We turn first to a consideration of whether the guaranty letter constituted a completed agreement.

I. Guaranty Letter: Accepted or Rejected?

A. Factual Background.

Appellant contends that Ralston rejected the letter of guaranty on September 29, at the signing of the underlying contract. The resolution of this contention turns on the testimony of the parties and letters exchanged between counsel for the parties.

As we have already noted, Ralston's interest in the frozen food processing plant rested in part upon a lease from the Wellston Growth Corporation, a community improvement corporation at Wellston, Ohio, which had constructed the plant for Ralston and had financed the construction through industrial revenue bonds. Payments under the lease funded the industrial revenue bonds in the principal amount of approximately seven million dollars. In addition, Ralston had obligated itself to pay certain water and sewer bonds in the sum of one million dollars. The contract provided that Ralston would assign its interest to Freezer Queen and that Freezer Queen would assume the obligations under the lease and bonds in addition to paying Ralston a certain amount of cash.

The oral negotiations led to a proposed written agreement which Halliday, the attorney for Nabisco and Freezer Queen,

submitted to Coleman, attorney for Ralston. That proposal contemplated a transaction solely between Ralston and Freezer Queen. Coleman responded to that proposal in part by proposing an indemnity guaranty by Nabisco. Coleman wrote on this matter:

> While I have not specifically checked this point with our management, it would probably be my recommendation that the various obligations assumed in this transaction by Freezer Queen Foods, Inc. be guaranteed by Nabisco, Inc., in a separate undertaking. I would appreciate your reaction to this proposal as soon as possible. [A:Exhibit Vol. I, E-45.]

In response to this suggestion, Nabisco's attorney, Halliday, prepared the letter of guaranty which has already been quoted, *see* p.4 *supra*, and Nabisco's president, Schaeberle, signed this letter guaranty. Thereafter, Halliday delivered the document to Coleman, Ralston's attorney, at the September 29th conference at Nabisco headquarters in New York City.

Upon reading the guaranty letter, Coleman informed Halliday that he wanted the guaranty letter changed from "wholly-owned subsidiary of Nabisco, Inc." to "subsidiary of Nabisco, whether wholly-owned or partially owed." Halliday agreed to the change and Coleman informed Shapleigh of the change. Nevertheless, when Shapleigh first read the guaranty letter on the afternoon of September 29, he expressed dissatisfaction with its terms. Shapleigh testified that he voiced objections to the language of the guaranty which provided that if Nabisco should dispose of Freezer Queen, that Nabisco would use its "best efforts" to obtain a similar guarantee from the purchaser of Freezer Queen. Shapleigh testified that he told Ralston's attorney, Coleman, that he considered the guaranty as "totally unacceptable."[3] [A:129.]

---

[3] At another point, in response to questioning by Ralston's attorney, Shapleigh testified as follows:

> Q. What were you questioning? A. I said, "Tom [Coleman], I don't think this is enough. This is not my understanding of the guarantee that we have been talking about. Throughout this whole negotiation we had been dealing I thought with Nabisco and this not an unconditional Nabisco guarantee."
>
> Q. What was the condition that you were questioning? A. Well, in the event that Nabisco should dispose of Freezer Queen Foods, why, they said they will just use their best efforts to take care of us.
>
> Q. And why was this a concern of yours? A. Well, we would —had no idea of what the future of Freezer Queen might be and thought all of the discussions that I had had and all the contacts that our top management had had we had been dealing with Nabisco and not with Freezer Queen. [A:91-92]

After also voicing similar objections to Stewart English, Nabisco's vice president of corporate development, who was conducting negotiations on behalf of Nabisco, Shapleigh testified that English responded by saying "[t]his is no problem, we'll get it corrected." [A:92.] English essentially confirmed this conversation. On further questioning, Shapleigh responded as follows:

> Q. Did you remove this condition that you were questioning? A. Yes.
>
> Q. And then what did you do? A. I signed the contract. [A:92.]

In sum, the testimony, without any real dispute, discloses that Nabisco presented Ralston's president, Shapleigh, with a form of a guaranty. When Shapleigh objected to the "best efforts" part of the second paragraph, Nabisco's representative, English, indicated that the matter would be satisfactorily resolved. Ralston's president, Shapleigh, then signed the contract selling the Wellston facility to Freezer Queen. He turned the letter guaranty over to Ralston's attorney, Coleman. Coleman endorsed on the letter, "Needs to be revised." Later that same day after the contract had been signed, and contemporaneously with continuing discussions relating to closing of the contract, Nabisco and Freezer Queen's attorney, Halliday, gave Ralston's attorney, Coleman, a letter interpreting the term "wholly-owned sub-

sidiary" in the guaranty to mean "subsidiary of Nabisco, Inc., whether wholly-owned or partially owned." [A:Exhibit Vol. I, E-68.]

Nabisco, in contending that Ralston never accepted the guaranty letter emphasizes (a) Shapleigh's verbal objections to the substance of the guaranty letter; (b) Coleman's phrase "Needs to be revised" written on the face of the guaranty; and (c) requests for a new guaranty by Ralston in subsequent correspondence.[4] Ralston contends that it accepted the Nabisco guaranty to the extent of the obligations contained therein upon receiving verbal assurances from Nabisco that it would later modify the guaranty and that Ralston evidenced its acceptance by executing the contract of assignment of the Wellston plant to Freezer Queen and by retaining the then-existing guaranty letter.

B. The Applicable Law.

An offer to guarantee the performance of another usually proposes a unilateral contract and the performance of the act requested furnishes consideration for the offeror's promises and

---

[4] On October 3, 1972, attorney Coleman wrote attorney Halliday:

> As we have indicated, the written commitment by Mr. Robert M. Schaeberle, dated September 29, 1972, as to Nabisco's obligations to Purina does not represent the extent of Nabisco's commitment to Purina under which this transaction was contemplated. I shall be happy to propose a new draft of this statement if you so desire. [A:Exhibit Vol. I, E-93.]

On November 8, 1972, Coleman wrote Thomas McDonnell, another Nabisco attorney, concerning closing of the sale and advised in part:

> We shall of course expect to receive at that [closing] time a revised letter agreement to replace the one from Nabisco's Robert M. Schaeberle to our Warren M. Shapleigh, dated September 29, 1972. This matter has been discussed with Walter Halliday and we are in agreement, in principal, to the changes he has or will recommend to Nabisco's management, as stated in our telephone conversation of October 26. [A:Exhibit Vol. II, E-278.]

is also an overt manifestation of assent. 1 Williston on Contracts, §§ 68-69; Restatement of Contracts, § 56. While the law is in much confusion as to whether notice of performance is necessary in order to bind the guarantor, *see* Williston, *supra*, §§ 69 (A)-(AA), we are not here concerned with notice, for the parties' manifestations took place in the presence of each other.

Contracts of guaranty often relate to a promise by the guarantor (offeror) to underwrite or guarantee the payment of another's debt or obligation to a creditor (offeree). The courts have recognized that an offeree who may act upon the guarantor's promise does not, by operation of law, necessarily repudiate or establish nonreliance upon the guaranty offer by requesting the execution of a new guaranty with somewhat different terms. *See Union Carbide Corp. v. Katz*, 489 F.2d 1374 (7th Cir. 1973).[5]

Nabisco cites *Lester Piano Co. v. Romney*, 126 P. 325 (Utah 1912), and *Juliana, Inc. v. Salzman*, 181 So.2d 3 (Fla. App. 1965), as support for its position that Ralston rejected or repudiated the proposed guaranty. In *Lester Piano*, the plaintiff sought a conditional guaranty from an officer of the defendant-debtor. The creditor rejected the proposed guaranty and forwarded another form to the guarantor. But, the record shows that the creditor had been extending credit to the debtor-company before receiving any guaranty and continued to do so after rejecting the unsatisfactory guaranty. No credit was ever extended in reliance upon that unsatisfactory guaranty. The court found no binding guaranty. Similarly, in *Juliana*, the record shows that the offeree rejected a proposed guaranty and did not rely upon it in entering into contract arrangements which were

---

[5] *See also Essex International, Inc. v. Clamage*, 440 F.2d 547 (7th Cir. 1971); *Coal & Iron Nat. Bank v. Suzuki*, 3 F.2d 764 (2d Cir. 19[illegible]); *Cinerama, Inc. v. Sweet Music, S.A.*, 355 F.Supp. 1113 (S.D. N.Y. 1972); *American Woolen Co. v. Moskowitz*, 144 N.Y.S. 532 (1913).

different than those initially contemplated between the plaintiff-creditor and a third party-debtor. Thus, these two cases are inapposite.

Factual circumstances here are substantially different than those encountered in any of the cases cited by the parties. The contract executed between the principals, Ralston and Freezer Queen, remained open-ended, or not final. Under the contract Freezer Queen reserved the privilege of declining to close the agreement if its president was not satisfied with arrangements for employment of Ralston's supervisory personnel at the Wellston plant or if its president or legal counsel was not satisfied that the natural gas allocation would become available to Freezer Queen after the closing date of the transaction. Ralston, of course, expected a new guaranty letter prior to closing.

President Shapleigh of Ralston never explicitly communicated a rejection of the guaranty to any Nabisco representative. In referring to the "best efforts" provision of the second paragraph of the guaranty letter, Shapleigh of Ralston testified as follows:

> "In the event Nabisco should decide to dispose of Freezer Queen Foods, Inc. at some future date." That did not satisfy me. I turned to Mr. English and said that this was not my understanding of what—the kind of guarantee, that the condition was not acceptable. And he said, "No problem, we'll get that changed. This is definitely a Nabisco deal." [A:176.]

Nabisco's Stewart English testified of overhearing conversation between Ralston's Coleman and president Shapleigh which English understood as an "objection to the guaranty because of terms relating to Freezer Queen as a wholly-owned subsidiary of Nabisco," since Nabisco might avoid liability by selling off a few of its shares in Freezer Queen.

Attorney Halliday of Nabisco testified that he did not hear Shapleigh [Ralston's president] say anything regarding the guar-

anty agreement but recalled that Coleman had earlier questioned the "wholly-owned" phrase in the guaranty.

As has been noted, Halliday met this objection by preparing a second letter defining "wholly-owned subsidiary of Nabisco, Inc." to mean a subsidiary, wholly-owned or partly owned. Ralston's attorney, Coleman, retained the guaranty letter and the subsequent interpretation prepared by Halliday.

Under the evidence in this case, the jury was entitled to accept the version of the transaction submitted by Nabisco's own witnesses. Under that version no rejection occurred but Nabisco was bound by the guaranty letter, modified by the interpretative letter issued by its attorney, Halliday. Moreover, Ralston's efforts to obtain further modification of the indemnity guaranty falls within the contract rule illustrated in *Union Carbide Corp. v. Katz, supra,* 489 F.2d at 1377, that the request for a new guaranty with modified terms does not necessarily invalidate the offer of the guaranty previously received and acted upon by the offeree. Thus, on this record, we reject appellant's contention attacking the binding effect of the guaranty agreement.

II. Whether the Guaranty Letter Extended to Freezer Queen's Obligation to Close the Contract.

Ralston contends that the language of the guaranty letter, that Nabisco would guarantee "the performance by Freezer Queen Foods, Inc. of its obligations arising out of the agreement" extended to every obligation in the underlying agreement, including Freezer Queen's obligation to close the transaction. Nabisco contends that it guaranteed only Freezer Queen's assumption of the existing lease of the premises, which supported the industrial revenue bonds in the approximate amount of seven million dollars and guaranteed the payment of an additional one million dollars in water and sewer bond obligations.

We examine this question from the four corners of the guaranty contract and, alternatively, consider all of the surrounding circumstances and relevant testimony. We conclude that Nabisco's guaranty promise was circumscribed and did not cover Freezer Queen's obligation to close the contract.

A. **The agreement terms covered obligations after the closing of the contract.**

We are presented with the question of the construction of the terms "obligations arising out of the Agreement" and "obligations under said Agreement" as used in the two-paragraph letter guaranty, which we requote:

> This will serve to confirm our mutual understanding and agreement that as long as Freezer Queen Foods, Inc. is a wholly owned subsidiary of Nabisco, Inc., Nabisco, Inc. will guarantee the performance by Freezer Queen Foods, Inc. of its obligations arising out of the Agreement between Freezer Queen Foods, Inc. and Ralston Purina Company of even date with respect to Ralson [sic] Purina Company's Wellston, Ohio facilities.
>
> In the event Nabisco, Inc. should decide to dispose of Freezer Queen Foods, Inc. at some future date, Nabisco, Inc. will use its best efforts to have the purchaser of Freezer Queen Foods, Inc. likewise guarantee the performance by Freezer Queen Foods, Inc. of its obligations under said Agreement. [A:Exhibit Vol. I, E-80.]

The first paragraph relates to the then-existing situation, *i.e.*, the guaranty of Freezer Queen in its status as a wholly-owned subsidiary and promises to guarantee Freezer Queen's performance of its "obligations arising out of the Agreement." In virtually identical language the phrase is reiterated in the second paragraph. But there the context is quite different, speaking

clearly of a time when Nabisco might dispose of Freezer Queen. Such disposition would necessarily occur in the future when Nabisco "will use its best efforts to have the purchaser of Freezer Queen Foods, Inc. *likewise* guarantee the *performance* by Freezer Queen Foods, Inc. *of its obligations* under said Agreement." (Emphasis added).

While the duty to close by Freezer Queen may represent an obligation arising out of, incident to, or under said agreement, the duty to close would in no way extend to some future purchaser of Nabisco's interest in Freezer Queen. Thus, the performance of "its [Freezer Queen's] obligations arising out of the Agreement" (first paragraph) or "its [Freezer Queen's] obligations under said Agreement" (second paragraph) implies commitments relating to long-term obligations extending beyond the closing of the contract.

B. **The relevant evidence supports a limited construction of the term "obligations."**

If we consider the questioned language to be ambiguous, the relevant testimony and surrounding circumstances supports unequivocally Nabisco's view that the term "obligations," referred only to Freezer Queen's duty to assume the bond and lease obligations and did not contemplate a guaranty of Freezer Queen's closing of the contract.

Although Ralston and top Nabisco officials had engaged in generally preliminary negotiations for several weeks, it became clear by September 25, that Freezer Queen, not Nabisco, would purchase the Wellston facility.

In the cover letter of the first incomplete draft of the underlying agreement, Nabisco's attorney, Halliday, wrote to attorney Coleman that:

> Article 3, when complete, will set forth the purchase price, the assumption of Ralston's obligations by Freezer Queen with respect to the various leases and agreements that are to be assigned, and the indemnity by Freezer Queen of Ralston with respect to any liability that might arise under the warranties given by Ralston as a result of Freezer Queen's failure to pay the amounts required by the lease with the Agency and the water service and sewer service agreements with the City of Wellston. [A:Exhibit Vol. I, E-23.]

Thus, "obligations" assumed by Freezer Queen were represented as an item separate from the purchase price. Coleman, in response to Halliday's draft contract, prepared and submitted proposals for the assignment and indemnification agreement covering Ralston's obligations under the water-sewer agreement, etc., and "Assignment and Assumption Agreement" covering the lease between Ralston and the Wellston Growth Corporation. That letter contained the paragraph previously quoted in part I of this opinion. *See* p.8 *supra*. The full text of the letter is reproduced in the margin.[6]

---

[6]

September 25, 1972

Mr. Walter S. Halliday, Jr.
General Counsel
National Biscuit Company
425 Park Avenue
New York, New York 10022

Re: *Wellston Property*

Dear Walt:
This is to acknowledge receipt of a copy of your proposed general Agreement with respect to our Wellston, Ohio, facilities.

For your review, comments and suggestions, I enclose a hurried proposed draft of an Assignment and Indemnification Agreement covering our obligations under the Water Service Agreement, etc. We would envisage a similar format for the Sewerage Service Agreement, etc.

Likewise, I also enclose proposed drafts of a simple "Assignment and Assumption Agreement", covering the lease between Purina and the Wellston Growth Corporation and a "Certificate Concerning Leased Equipment" which we propose to send to the City of Wellston, the Wellston Growth Corporation and the Third National Bank in Nashville, Trustee, for their approval.

While I have not specifically checked this point with our management, it would probably be my recommendation that the various obligations assumed in this transaction by Freezer Queen Foods, Inc. be guaranteed by Nabisco, Inc., in a separate undertaking. I would appreciate your reaction to this proposal as soon as possible.

I have no pride of authorship in the foregoing enclosures and trust that they will be regarded as preliminary suggestions for further discussion, additions, etc.

Yours very truly,

/s/Tom
Thomas C. Coleman
Counsel
Consumer Products Group
[Ralston Purina Company]

TCC:kjk

cc: Mr. D. R. Seibel, 3T
Checkerboard Square
St. Louis, Missouri 63183

[A:Exhibit Vol. I, E-45.]

In the context of this exchange of correspondence, the term "obligations assumed in this transaction" relates to Ralston's obligations for lease payments for retirement of industrial revenue bonds and obligations under water and sewer bonds which Freezer Queen would assume and which Ralston would guarantee.

None of Ralston's witnesses testified that Ralston understood that the guaranty in question included an obligation of Nabisco to guarantee Freezer Queen's closing of the transaction. President Shapleigh of Ralston testified that he wanted the guaranty to relieve Ralston of its obligations at Wellston including the water and sewer bonds, the lease, the general revenue bonds, and taxes. [A:131, 134-35.] Attorney Coleman, who assumed the duty on behalf of Ralston of reducing the general terms of the negotiations into a specific legal contract, outlined the specific obligations only. His testimony corroborated the intent reflected in his correspondence.

Q. [Counsel for Nabisco] Now, did you understand that Freezer Queen, Inc., as to assume certain obligations that Ralston had down in Wellston, Ohio? A. [Coleman] Yes.

Q. And would you tell His Honor and the Jury what those obligations were? A. Well, they consisted basically of four obligations. There was a seven million dollar industrial revenue bond issue. There was a water supply bond agreement and a sewer supply agreement bond. Then there was a small supplemental water agreement. There are four—basically four sets of obligations that I was aware of.

Q. Lease? A. Then there was a lease from the Wellston Growth Corporation into the Ralston Purina Company.

* * *

Q. And you understood then that the seven million dollars in revenue bonds and the approximately million dollars in water and sewer bonds would be assumed by Freezer Queen? A. Yes. [A:434-35.]

Coleman added that in his discussion with Nabisco's attorney, Halliday, on September 29, he understood that there would be a guaranty from Nabisco that they would stand behind the obligations assumed by Freezer Queen. He termed those obligations as those "down in Wellston" and added that "if Freezer Queen Foods would not remain a subsidiary, they [Nabisco] would use their best efforts to try to find—to persuade the next purchaser of the plant to assume these obligations." [A:441.]

In presenting its case, Nabisco recalled Coleman as an adverse witness. Coleman admitted that he never asked Nabisco to guarantee Freezer Queen's closing nor did he even have such a contingency in mind. The testimony proceeded as follows:

> Q. Mr. Coleman, in all of these conversations and all of this correspondence did you ever request that Nabisco guarantee that Freezer Queen would close on the date set forth for closing in that contract? *Did you ever ask that the guarantee include a guarantee that Freezer Queen would close the contract?* A. *I never asked that question.*
>
> Q. No, sir. *You never had that in mind, did you?* A. *No, I didn't.*
>
> [A:1299 (emphasis added).]

Then, Nabisco 's counsel asked the following question:

> Q. The only thing that you ever had in mind with respect to the guarantee was that Nabisco would guarantee to pay off those obligations that Freezer Queen assumed in the contract on the date of closing that were remaining down in Wellston, Ohio. You wanted that to be stood behind by Nabisco, did you not? [A:1299.]

After some equivocation and a comment by the trial judge that the witness had not answered the specific question, Coleman responded:

> Well, that was certainly one of the things I was thinking about and wanting during that period. [A:1300.]

Coleman further conceded that he would have drafted the guaranty in the same manner as written by Halliday except "without any conditions as to wholly-owned or otherwise."[7] [A:1300.]

---

[7] Coleman also testified as to a conversation he had with president Shapleigh on September 29, concerning the guaranty:

> Q. And what, if anything, did he [Mr. Shapleigh, Ralston's president] say to you with respect to Exhibit 28? A. As we were walking toward the library he said well, that even with that change this wasn't the guarantee that the parties were contemplating and I was mortified I think is the best way because I said, you know, "Why isn't it? Why isn't it exactly what we had?" He said, "It's not broad enough. It's not an uncondi-

Finally, we observe that Freezer Queen reserved the right not to close the contract unless it could, to its satisfaction, obtain Ralston's supervisory employees needed to operate the Wellston plant and obtain the full natural gas allocation from Columbia Gas Company. Only a strained and unusual construction of the contract would apply the guaranty to the obligations of Freezer Queen to close the contract which remained indefinite as of September 29, 1972.

Ralston relies on some general statements of Nabisco's president, Schaeberle, given in a deposition and read into the trial record, as support for its proposition that Nabisco's guaranty-letter guaranteed Freezer Queen's closing. When Schaeberle was asked where the consideration to buy the plant was going to come from, he said:

> A. It was going—I have to plead ignorance as to how much was in cash and how that was all going to be worked out. I'm not at all certain, but it was a contract between one of our wholly-owned subsidiaries, Freezer Queen.
>
> Q. And Nabisco was standing behind it on the guarantee——
>
> A. On the guarantee of the performance that on this contract that was carried by Freezer Queen, that we would stand behind Freezer Queen. [A:347.]

This statement at best is equivocal. Moreover, it must be construed in the context of the resolution of the Nabisco Board of Directors granting its officers authority to execute a guar-

---

tional guarantee which I understand we are going to get from Nabisco."

In other words, *regardless of what happens to Freezer Queen Nabisco would stand behind or assume Ralston's payment under these bonds* and it was kind of at that point that we were then right up in the same room with Mr. English and Mr. Halliday. [A:405 (emphasis added).]

anty "of the performance by Freezer Queen Foods, Inc. *of its obligations under said lease and related water service and sewer service agreements.*" [A:Exhibit Vol. I, E-75 (emphasis added).]

The letter guaranty and the critical language therein read within its four corners does not evidence Nabisco's intent to guarantee Freezer Queen's closing. Furthermore, the correspondence and trial testimony of Ralston's attorney, Coleman, demonstrates that Ralston sought a guaranty relating only to the revenue bonds, sewer and water bonds, and lease obligations. Finally, Nabisco's corporate resolution authorized a guaranty only of long-term obligations of the lease which would retire the revenue bonds and water and sewer bonds. We find no basis in the record to impose upon Nabisco a guaranty of any obligations other than those long-term obligations referred to in precontract correspondence and documents. The obligations referred to in the letter agreement thus did not include the obligation to guarantee that Freezer Queen would close the underlying contract. Accordingly, the trial court erred in refusing to direct a verdict for appellant and in denying judgment n.o.v.

III. **Disposition of Other Issues.**

Since Nabisco did not underwrite or guarantee Freezer Queen's obligation to close the contract, the determination of the jury that Ralston Purina established good faith satisfaction of Freezer Queen as to the employee and gas issues, and its determination that gas allocation had, in fact, been restored, become immaterial and we do not address those issues.

As we have noted, the underlying contract required that disputes between Ralston and Freezer Queen be referred to arbitration. Since the letter guaranty did not guarantee a closing, Nabisco cannot be held liable for damages unless an arbitration panel determines that Freezer Queen breached the underlying contract by not closing. Accordingly, Ralston's failure to establish that Nabisco guaranteed Freezer Queen's obliga-

tion to close the contract is fatal to the plaintiff's case for damages and the judgment must be reversed and the damage award vacated.

Accordingly, we reverse and remand this case to the district court for the entry of an appropriate modified judgment and for vacation of the award of damages. Appellant is entitled to 50 percent of its costs on this appeal.[8]

VAN OOSTERHOUT, Senior Circuit Judge, dissenting:

I respectfully dissent. Plaintiff's pleaded cause of action is based exclusively on the letter guaranty set out in the majority opinion.[9]

We do not have before us a situation where the person tendered the guaranty acted in reliance upon it without comment. In our case, Ralston flatly rejected the guaranty as written and as supplemented by the interpretation agreement, which clarified paragraph one but did not meet Nabisco's objections. The evidence is conclusive that there was no meeting of minds on the letter agreement or any other written guaranty. Nabisco was specifically advised that Ralston found the letter agreement unacceptable and wrote thereon "needs to be revised."

---

[8] The adjudication in district court is not a complete nullity, however, for the jury properly determined that Ralston Purina "accepted" the guarantee. We have, in accordance with this opinion, determined the guaranty to be limited in scope. That part of the jury verdict determining that Ralston accepted the guaranty should be incorporated into a modified judgment and be given such effect as may be appropriate should Ralston seek arbitration and obtain an arbitration award against Freezer Queen for the latter's alleged breach of contract.

[9] The issue of an oral guaranty and its effectiveness in light of the Statute of Frauds is not before us.

There is no substantial evidence to support a finding that Ralston accepted the guaranty pleaded.[10]

The threshold determination that no valid guaranty has been established makes it unnecessary to consider other issues raised and answered by the majority and I express no view thereon.

Nabisco has challenged the sufficiency of the evidence to support the judgment by timely motions for directed verdict and judgment n.o.v. I would reverse and remand with directions to dismiss the complaint.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

---

[10] Why Ralston signed the purchase contract without a guaranty is immaterial to the issues here. The evidence reflects that Ralston for tax purposes was in a hurry to complete the sale and may well have relied on Nabisco's representation that a mutually satisfactory guaranty agreement could be worked out.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-1444

Ralston Purina Company, Appellee,

v.

Nabisco, Inc., Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: July 7, 1976

Filed: August 25, 1976

Order on Petition for Rehearing

A. In response to the petition for rehearing, the panel before whom this case was heard, modifies part III of its opinion by striking therefrom the last line of slip opinion p. 23 and the next nine lines on p.24. Additionally, note 8, of slip opinion is modified by adding the phrase, "if any," between "effect" and "as" in the seventh line thereof.

As modified, part III reads:

III. **Disposition of Other Issues.**

Since Nabisco did not underwrite or guarantee Freezer Queen's obligation to close the contract, the determination of the jury that Ralston Purina established good faith satisfaction of Freezer Queen as to the employee and gas issues, and its determination that gas allocation had, in fact, been restored, become immaterial and we do not address those issues.

Accordingly, we reverse and remand this case to the district court for the entry of an appropriate modified judgment and for vacation of the award of damages. Appellant is entitled to 50 percent of its costs on this appeal.[8]

---

[8] The adjudication in district court is not a complete nullity, however, for the jury properly determined that Ralston Purina "accepted" the guarantee. We have, in accordance with this opinion, determined the guaranty to be limited in scope. That part of the jury verdict determining that Ralston accepted the guaranty should be incorporated into a modified judgment and be given such effect, if any, as may be appropriate should Ralston seek arbitration and obtain an arbitration award against Freezer Queen for the latter's alleged breach of contract.

B. We also modify the sentence beginning on line 11 of the first complete paragraph on page 5. As modified, that sentence commencing on said line 11, page 5, shall read as follows:

> In its brief appellant Nabisco asserts that Ralston could not bring a legal action against Freezer Queen for breach of the underlying sales contract since that written contract provided that any controversy arising out of the contract would be settled by arbitration.

C. Except as provided herein, the petition for rehearing with the suggestion for a rehearing *en banc* is denied as said petition has failed to receive an affirmative vote of the majority of circuit judges who are in regular active service.

Chief Judge Gibson and Circuit Judges Ross and Webster dissent from this order and would grant a rehearing *en banc*. Judge Van Oosterhout adheres to his dissenting opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-702

RALSTON PURINA COMPANY,
Petitioner,

vs.

NABISCO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

R. H. McROBERTS, SR.
VERYL L. RIDDLE
THOMAS C. WALSH
ROBERT F. SCOULAR
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Respondent

BRYAN, CAVE, McPHEETERS & McROBERTS
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-702

RALSTON PURINA COMPANY,
Petitioner,

vs.

NABISCO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner has asked this Court to grant certiorari in this breach of contract case because the Eighth Circuit supposedly exceeded the proper scope of appellate review. Petitioner does not contend that this dispute involves any fundamental unsettled legal principles warranting this Court's attention, nor does it assert that the decision below conflicts with any ruling of this Court or of any other Circuit. Rather, the only question raised by the Petition, which is hardly of earth-shaking significance, is whether the Court of Appeals erred in holding as a matter of law that the guaranty in issue was ambiguous and in ruling that there was no evidence to support the jury's interpretation of it.

STATEMENT OF THE CASE

Petitioner Ralston entered into a contract with respondent Nabisco's wholly-owned and financially responsible subsidiary, Freezer Queen Foods, Inc., in which Freezer Queen agreed to buy a food processing plant in Wellston, Ohio, from Ralston if certain express conditions were met. The Ralston-Freezer Queen contract contained an arbitration clause. Freezer Queen was to pay approximately $1 million at closing and, as the remainder of the consideration for the contract, agreed to assume approximately $8 million of Ralston's lease and bond obligations with respect to the plant. At the last moment, Ralston requested Nabisco to guarantee the obligations to be assumed by Freezer Queen in the transaction. Accordingly, Nabisco's counsel dictated a two-paragraph letter, stating in pertinent part as follows:

> "This will serve to confirm our mutual understanding and agreement that as long as Freezer Queen Foods, Inc., is a wholly-owned subsidiary of Nabisco, Inc., Nabisco, Inc., *will guarantee the performance by Freezer Queen Foods, Inc., of its obligations* arising out of the agreement between Freezer Queen Foods, Inc., and Ralston Purina Company of even date *with respect to Ralston Purina Company's Wellston, Ohio, facilities.*" (Emphasis added.)

When that letter was tendered to Ralston's president, he immediately stated that it was "unsatisfactory," and Ralston's counsel promptly wrote "needs to be revised" across the face of the letter. Several times thereafter, Ralston expressly requested that a satisfactory guaranty be delivered at closing. However, Freezer Queen subsequently charged that Ralston had failed to comply with two conditions precedent to Freezer Queen's duty to buy the plant and therefore refused to close the transaction. Hence, a "satisfactory" guaranty was never prepared.

Following its disposal of the plant to another company, Ralston decided to forego arbitration against Freezer Queen in New York and instead proceeded directly against Nabisco in St. Louis on the so-called guaranty letter. After discovery, Nabisco filed a motion for summary judgment contending that the guaranty letter did not reflect a meeting of the minds of the parties and further arguing that even if the guaranty had been accepted, it did not encompass the duty to close, which Freezer Queen had allegedly breached. The trial court denied the motion and ordered the case to be tried. Again at the outset of the trial, counsel for Nabisco urged the court first to take evidence on the contract issues so as to avoid the "monumental waste of time" involved in trying the issues concerning the alleged breach by Freezer Queen of the underlying contract. Again, however, Nabisco's suggestions were summarily rejected.

On the disputed issue of the scope of the guaranty, the trial court determined that the guaranty letter was ambiguous because it did not specify what "obligations" were to be guaranteed. Even though there was no conflict in the extrinsic evidence, the district court, over Nabisco's objection, permitted the jury to determine the meaning of the guaranty letter. The evidence showed that the only contemporaneous written document referring to a guaranty suggested that Nabisco should guarantee "the various *obligations assumed* in this transaction by Freezer Queen." The only "obligations assumed" were the lease and bond obligations to be assumed by Freezer Queen if and when the transaction was closed. Furthermore, the Nabisco Board had authorized only a guarantee of Freezer Queen's "obligations under said lease and related water service and sewer service agreements." Ralston's house counsel and chief contract negotiator admitted on the witness stand that at no time had Ralston ever asked for any guaranty that the transaction would be closed. Nevertheless, the jury, as part and parcel of a demonstrably biased verdict, found that Nabisco had agreed to guarantee the closing.

The Court of Appeals, having scoured the record for evidence to support the jury's verdict, found none. After holding the guaranty to be ambiguous, the Court applied the traditional rules of appellate review and set aside the jury's verdict as being completely unsupported by the evidence. Judge Van Oosterhout filed a "dissenting" opinion in which he essentially concurred in the result but would have held that there was no meeting of the minds between the parties on the guaranty and, hence, no need to construe the guaranty letter.*

REASONS WHY THE WRIT SHOULD BE DENIED

I

Despite the vehemence of the Petition, this case involves the routine performance by the Court of Appeals of its duty to rectify an injustice caused by a jury which went astray. The Petition presents nothing more than an issue concerning the sufficiency of the evidence. There are no concepts of overriding importance in this lawsuit. The Court of Appeals, applying universally accepted precepts, simply held as a matter of law that the guaranty letter was ambiguous and that all of the surrounding circumstances and relevant evidence compelled a conclusion contrary to that reached by the jury. It is difficult to understand how Ralston can quarrel with the Court of Appeals' analysis in view of its own house counsel's admission on the witness stand that Ralston never even asked for a guaranty that the contract would be closed.

---

* Although three judges dissented from the denial of rehearing en banc, it is only a matter of conjecture whether they would have voted to uphold the jury's verdict or to adopt the opinion of Judge Van Oosterhout. If certiorari is granted, respondent will urge that the result below is supported by the reasoning of Judge Van Oosterhout's opinion as well as by that of the majority opinion.

Petitioner erroneously states at page 17 that the guaranty should have been "strictly construed against the party seeking to limit its scope." Under the applicable New York law, the liability of a guarantor is *strictissimi juris*, and his obligation cannot be extended by implication beyond the precise words used. *100 Parkway Road v. Johns-Manville, Inc.*, 14 N.Y.S. 2d 830 (App. Div. 1939), *aff'd* 34 N.E. 2d 906 (1941). A guaranty "is to be strictly construed against the party for whose benefit it is given in the guarantor's favor." *Coburn Corporation of America v. Orr*, 304 N.Y.S. 2d 345 (1969), *Schlem v. Jesaitis*, 37 N.Y.S. 2d 943 (1942). But this case does not turn on canons of construction, for whatever rules are applied, the Eighth Circuit's resolution of the question is unassailable.

II

In an attempt to inject some color into an otherwise pallid legal dispute, petitioner, at pages 21-24 of its Petition, challenges the propriety of a portion of the Court of Appeals' original opinion which was deleted in response to Ralston's petition for rehearing (See Pet. A-24-25). The Court of Appeals did not hold that an obligee must first proceed against an obligor before pursuing the guarantor. Nor did it hold that Nabisco is now entitled to arbitration even though it had consciously chosen to have a court of law, rather than an arbitrator, determine the extent of its obligation to Ralston. The Court simply held that the duty allegedly breached by Freezer Queen was not guaranteed by Nabisco. Therefore, since Ralston has no claim against Nabisco, the Court observed that petitioner is relegated to proceeding against Freezer Queen, presumably in arbitration. Apart from the fact that Ralston has mischaracterized even the original opinion of the Court of Appeals, it is clear that the language of that opinion which Ralston challenges here was excised from the panel's modified opinion at the urging of Ralston.

The inescapable reality of this case, evident from the outset, is that petitioner proceeded against the wrong party in the wrong forum. The district court's repeated refusal to acknowledge that fact was properly corrected by the Court of Appeals, and its opinion presents nothing of substance for this Court to review.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

R. H. McROBERTS, SR.

VERYL L. RIDDLE

THOMAS C. WALSH

ROBERT F. SCOULAR
500 North Broadway
St. Louis, Missouri 63102

Attorneys for Respondent

BRYAN, CAVE, McPHEETERS & McROBERTS
Of Counsel